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No. 616

In the Supreme Court of the United States

OCTOBER TERM, 1954

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE, PETITIONER

v.

UNITED STATES EX REL. JOSEPH ACCARDI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

SIMON E. SOBELOFF,
Solicitor General,
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In our brief filed when this case was here for the first time, we pointed out that hearing officers and the Board of Immigration Appeals had taken favorable action in cases involving aliens under the Attorney General's program. Brief for Respondent, No. 336, O. T. 1953, pp. 35–36. In our main brief now (p. 34), we have referred back to the cases then cited, urging that such instances lend support to the District Court's finding that the Board, as its members all testi-

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fied, exercised the independent judgment required by the regulations.

Respondent (Br. 22–23) finds this argument "completely refuted by the Chairman of the Board who stated that in all program cases the aliens had been directed to leave the country. (R. 119–120)." He insists (Br. 30) that, despite the uniform testimony to the contrary, this case, because it was under the program, must be viewed as one "where the agency head finally resolved the merits of a case before the matter was heard by his subordinates."

We believe, however, that the decisions to which we have referred (and we confine this discussion to such cases) add to the demonstration that respondent's assertion, rejected by the District Court, is unwarranted. The decisions show, even in cases where the ruling has been unfavorable to the alien, a pattern of careful, thorough, judicious consideration prior to the final determination. They argue eloquently against the *a priori* assumption that cases of this type could not have been fairly heard, despite the sworn testimony of the hearers that they were.

In two cases under the program, both cited in our brief last year when decisions favorable to the aliens had been rendered by special inquiry officers (Resp. Br., No. 366, O. T. 1953, p. 35, fn. 8), final decisions of non-deportability have now been rendered by the Board. *Matter of M——*, Imm. File No. E-076873 (February 11,

1954); *Matter of R——*, Imm. File No. A-4656075 (December 14, 1954). In the first of these, both the Special Inquiry Officer and the Board concluded that the respondent, a naturalized citizen, had overcome a presumption of expatriation from extended foreign residence and was therefore still a citizen and, of course, non-deportable. The Inquiry Officer's decision and the Board's brief affirmance, both rendered before this Court's decision a year ago in the instant proceedings, are reproduced as Case No. I in the Appendix to this brief.[1]

In the second of the foregoing cases, *Matter of R——*, the Special Inquiry Officer had held before last year's decision by this Court, that the alien involved was non-deportable, concluding, *inter alia*, that the violation of the Mann Act there involved did not constitute a crime involving moral turpitude within the meaning of the provision making such crimes a basis for deportation. Thereafter, in a ruling vigorously contested by the Immigration Service, the Board affirmed this decision. (Case No. II, Appendix, *infra*.)

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[1] As respondent states (Br. 23), the Chairman of the Board testified that a check had been made for him and that he knew of no cases under the program in which the final order had not required voluntary departure or compulsory deportation (R. 120). However, the Chairman had also pointed out that the Board kept no special records of such cases (R. 119), and the actual fact, officially recorded, is that the check on which he based his testimony overlooked the case cited above.

APPENDIX

This result could fairly be called debatable. Cf. *Jordan* v. *De George*, 341 U. S. 223. Surely, the Inquiry Officer and the Board, had they felt, in respondent's words (Br. 30), that "the agency head [had] finally resolved the merits", could have found turpitude in a statute defining the conduct it forbids in terms such as "debauchery" or "immoral purpose." 18 U. S. C. 2421.

We referred last year to two other decisions, in which the Board had affirmed orders granting the aliens the privilege of voluntary departure (Resp. Br., No. 366, O. T. 1953, p. 35, fn. 9). To be sure, such relief falls considerably short of the alien's hope to remain in this country. It is to be noted, nevertheless, that Congress authorized it as a matter of special, discretionary favor, and that it entails potentially substantial benefit. An alien who is arrested and deported is thereafter ineligible for a visa unless the Attorney General consents to his application for readmission. Immigration and Nationality Act of 1952, Sec. 212 (a) (17), 66 Stat. 182, 8 U. S. C. 1182 (a) (17); and see, to the same effect, 45 Stat. 1551, 8 U. S. C., 1946 ed., 180 (a). It is clear, then, that there is a sound reason for the efforts of many deportable aliens to be permitted to depart voluntarily and that the grant of such relief is not to be dismissed as insignificant.

Finally, we mentioned last year four cases in which, following orders for deportation, the Board had ordered reopening to consider further

applications for suspension or to permit the filing of such applications. Bringing these cases up to date, three have ultimately resulted in final orders for deportation.[1] In the fourth (*Matter of B———*, Imm. File No. A-2544646), the Board authorized suspension of deportation on March 8, 1955, but on motion of the Immigration Service, alleging the existence of evidence which showed that the alien was neither eligible for relief under the statute nor worthy of relief if eligible, the Board ordered the case reopened on April 6, 1955. We print as Case No. III in the Appendix the decision of the Special Inquiry Officer denying suspension after the Board's initial order reopening to consider such relief (November 15, 1954), the Board's subsequent decision authorizing suspension (March 8, 1955), and the Board's order again reopening the case on motion of the Service (April 6, 1955).

While none of these last four cases has finally resulted (so far at least) in action favorable to the alien, all reflect sober, careful, unhurried judgments on the merits. Even the much discussed matter of "expedition," while it may have meant careful scrutiny of requests for postponements and avoidance of unnecessary delay, has not

[1] *Matter of F———*, Imm. File No. E-062511 (appeal to Board dismissed August 2, 1954); *Matter of C———*, Imm. File No. E-051721 (appeal to Board dismissed October 28, 1954); *Matter of M———*, Imm. File No. A-3436560 (appeal to Board dismissed October 20, 1954).

meant—and the instant case itself illustrates this—hasty or merely *pro forma* decisions.

It remains important, we think, that the claim respondent presses is for executive clemency, left by Congress to the discretion of the Attorney General, with a Congressional veto reserved only over decisions favorable to the alien. But apart from this, and recognizing fully that respondent was entitled under the Attorney General's regulations to the Board's independent judgment on this matter, the record in this case wholly justified the District Court's finding that the requirement was met. The materials in this reply brief, confined to cases which had already been mentioned, supply concrete illustrations of the Board's exercise of painstakingly sober judgment in other so-called program cases. The sworn testimony of the Board members shows that they exercised such judgment in the case of Accardi, whose claim for special relief was on its face an unappealing one. The finding of the District Court that they were telling the truth, and that their statements accurately portrayed the process of their decision, is a fair and sensible appraisal of the evidence. Rejection of that finding as "clearly erroneous" has turned on a kind of presumption of frailty and deviousness—on an assumption that the Board members *must have* believed the Attorney General was hinting to them through press releases not to do what his regulations said, even though the regulations were

his to change and their decisions subject to reversal by him. This assumption is neither attractive nor compelling. It cannot justify reversal of the District Court's finding that respondent had failed to prove his allegation of prejudgment.

Respectfully submitted.

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APRIL 1955.

APPENDIX

Case No. I

MATTER OF M------, IMM. FILE NO. E-076873

A. DECISION OF SPECIAL INQUIRY OFFICER

Discussion: This record relates to a 62 year old married male, a native of Italy, who testified that he is a citizen of the United States by naturalization. He presented Certificate of Naturalization showing that he was naturalized at a regular term of the District Court of the United States at Cleveland, Ohio, on March 18, 1920, under the provisions of Section 4, Sub-Division 7 of the Act of May 9, 1918.

The respondent testified that he has been living in Mexico for the past sixteen or seventeen years; that he first entered Mexico in November, 1933 and that after a short stay there he returned to the United States; that in 1934 he went back to Mexico and that he has been living in Mexico for most of the time since 1935. He stated that he has been a legal resident of Mexico since April 13, 1942 and has lived there continuously from that date until April 10, 1953, with the exception of periodic visits to the United States. He stated that he last entered this country at San Antonio, Texas on April 10, 1953, being admitted at that time as a citizen of the United States. Such admission has been verified (Exhibit 17).

There was entered into evidence as Exhibit 3,

a photostatic copy of a Tourist Permit No. 234410 issued on January 16, 1935 in Cleveland, Ohio, to one Frank Milano, establishing that he entered Mexico on January 20, 1935. The respondent identified the aforementioned document as relating to him. The following listed photostatic copies of documents in the Spanish language, with English translations thereof, which respondent identified as relating to him, were also made part of the record as indicated:

Exhibit 4—Letter from the respondent, dated February 27, 1935, to the Mexican Immigration Service, requesting that his migratory status be adjusted.

Exhibit 5—Letter from the Mexican Immigration Service, dated March 16, 1935, to the respondent granting him the status of conditional immigrant for one year.

Exhibit 6—Letter from respondent, dated March 16, 1936, requesting the Mexican Immigration Service to authorize a year's extension of his status or, if possible, to grant him the status of permanent resident.

Exhibit 7—Letter from the Mexican Immigration Service to respondent, dated March 30, 1936, granting one year's extension of his permit to reside in Mexico.

Exhibit 8—Letter from respondent to the Mexican Immigration Service, dated March 1, 1937, requesting a year's extension of his status.

Exhibit 9—Letter from the Mexican Immigration Service to respondent, dated March 18, 1937, granting one year's extension of his residence in Mexico.

Exhibit 10—Letter from respondent to the Mexican Immigration Service, dated

February 10, 1938, requesting a year's extension of his residence in Mexico.

Exhibit 11—Letter, dated March 17, 1938, from the Mexican Immigration Service to the respondent granting him one year's extension of his permit to reside in Mexico.

Exhibit 12—Letter from respondent, dated January 20, 1939, to the Mexican Immigration Service, requesting an extension of his status for one year.

Exhibit 13—Letter, dated February 15, 1939, from the Mexican Immigration Service to respondent granting him permission to reside in Mexico for the fifth consecutive year.

Exhibit 14—Letter from the Chief of the Mexican Immigration Service to the Officer in Charge of that Service at Nuevo Laredo, dated February 15, 1940, instructing that the respondent be allowed to depart and reenter Mexico at that Port while his migratory status is in the process of being adjusted. This document bears the signature of the respondent on the margin.

Exhibit 15—Letter from the respondent, dated at Mexico City, Mexico, February 27, 1940, to the Mexican Immigration Service, requesting that two bonds posted by him in 1935 be returned, inasmuch as one of them was no longer necessary because he had posted a new bond.

Exhibit 16—Letter from the respondent, dated May 14, 1951, to the Mexican Foreign Office stating that he had not bought property for which he was granted permission in 1951 and requesting new permission to buy two pieces of land in the State of Vera Cruz. In this document the respondent identified himself as a United States citizen, a legal resident of Mexico since

> April 13, 1942, and agrees to consider himself as a Mexican, insofar as rights to and income from certain property are concerned and also agrees not to invoke any protection from his Government in these matters.

It is concluded that Exhibits 3 to 16 inclusive, together with the testimony of the respondent that he has been living in Mexico since 1935, establishes that the respondent's place of abode was in Mexico from at least January 20, 1935, until he last entered the United States on April 10, 1953.

The question at issue in this case is whether the respondent, by reason of his residence in Mexico or by the commission of any overt act, has expatriated himself under the provisions of the second paragraph of Section 2 of the Act of March 2, 1907, or Statutes enacted subsequent thereto, namely: The Nationality Act of 1940 and the Immigration and Nationality Act.

Under the provisions of the second paragraph of Section 2 of the Act of March 2, 1907, a naturalized citizen of the United States who resided for two years in the foreign state from which he came or for five years in any other foreign state, became subject to a presumption that he had ceased to be a citizen of the United States. That provision was repealed by Section 504 of the Nationality Act of 1940. However, the presumption of cessation of the citizenship of naturalized citizens of the United States who resided continuously for five years in any other state was continued in force, in certain cases, until October 16, 1946, under the provisions of Section 404 (c)

of the Nationality Act of 1940. It has been held that the above-mentioned provisions of Section 2 of the Act of 1907 may operate to terminate citizenship status and in order to overcome the presumption it must be made to appear that there has not been an abandonment of intention to remain a citizen of the United States (1. I&N Dec. 398.563).

The respondent testified that he never at any time intended to make his permanent home in Mexico; that he always considered his principal place of residence to be with his family in the United States and that his only purpose in acquiring the status of a legal resident under the Mexican laws was to enable him to hold property and make investments in Mexico, because under Mexican law foreigners are not allowed to operate a business or buy land there unless such person becomes a resident of Mexico. He testified that he had never voted, held public office, or subscribed to any oath in Mexico and had never been employed by the Government of Mexico in any capacity. He stated that he has property and investments in Mexico worth between $50,000.00 and $75,000.00, which he intends to sell before returning to live in the United States and has not filed an income tax return in this country since 1935, because he had no earnings here, but that in 1953 he filed for a gift tax in connection with a gift of $70,000.00 he made to his wife to enable her to purchase property in the form of a parking lot in Los Angeles, California, from which she derives an income of $350.00 per month.

The respondent testified that although his wife has visited him in Mexico since 1935 on a number

of occasions, she has always resided in the United States; that from 1935 to 1936 she resided in Lyndhurst, Ohio and since 1936 she has resided at Akron, Ohio in a home owned by her. He stated that his four children, all between 15 and 21 years old were born in the United States and have always lived in the United States; that his two younger children were born while he was in Mexico and that he had supported his family and educated his children in the United States.

The respondent testified that during the time he has been in Mexico he registered as a United States citizen on two occasions, the first time with the American Consul at Port Mexico, Vera Cruz, during 1944 and again with the American Consul at Vera Cruz, Mexico on December 12, 1945. He presented an American Foreign Service Form 225–B, "Card for Identification for use on the Mexican Border", issued to him by the American Consul at Vera Cruz, Mexico, upon respondent's allegation, under oath, that he was a citizen of the United States, granting the respondent permission under the Act of May 22, 1918, as amended by the Act of June 21, 1941, to depart from and reenter the United States upon presentation of the certificate to an American Immigrant Inspector at any Port on the Mexican Border between December 12, 1945 and October 14, 1946, subject to such restrictions as the Secretary of State may prescribe. The respondent testified that between January 20, 1935 and February 29, 1940 he visited the United States many times and since 1942 he has visited this country every year, except for one or two years. He stated that since 1935 he has traveled

with a United States Passport, which he presented whenever he entered this country from Mexico. He is presently the holder of a United States Passport, No. 471893, issued to him at Washington, D. C., on June 28, 1951. Exhibit 22 consists of photostatic copies of documents in the Spanish language, with English translation thereof, which relate to the respondent, corroborating his testimony as to the frequency of his visits to the United States.

The respondent further testified that he has been a dues paying member of the American Legion, Wilkie Post 19, at Akron, Ohio. He presented a Certificate of Registration, showing that he was duly registered under the Selective Service and Training Act of 1940 on November 5, 1942 with Local Board No. 8, Summit County, Ohio, at which time he gave his address as 505 North Hawkins Avenue, Akron, Ohio. He also presented a permit from his Local Board, granting him permission to depart from the United States to Mexico for six months. The respondent stated that his Local Board informed him that on account of his age he did not need any further permits. He stated that during the summer of 1952, while in the United States, he registered to vote and did vote in the last Presidential Election by means of an absentee ballot. Exhibit 21 is a Voting Record from the Summit County, Ohio Board of Elections, indicating that Frank Milano, 375 North Hawkins Avenue, Akron, Ohio, registered on August 27, 1952 and voted the same year.

According to the evidence of record the respondent's only reason in acquiring residence in

Mexico was to enable him to make investments and buy property in Mexico in compliance with the laws of that country. During his entire residence in Mexico, the respondent's wife and family, to whom he furnished support, resided continuously in the United States. He maintains that he never, at any time, had any intention of making his permanent home in Mexico; that he always considered his home to be with his family in the United States; and that it was always his intention to return to them. He has made periodic trips to the United States since 1935, on which occasions he stated he was in possession of a United States Passport. His last United States Passport, still in his possession, was issued to him at Washington, D. C., on June 28, 1951. He registered with the American Consul in Mexico, as a citizen of the United States, during 1944 and on December 12, 1945.

It is the view of the Department of State that a naturalized citizen of the United States did not lose his citizenship as a result of failure to rebut the presumption of loss under the provisions of the second paragraph of Section 2 of the Act of March 2, 1907, and that the statutory provision of that Section related only to the question whether diplomatic protection should be extended to naturalized citizens after five years residence in a foreign state other than that from which they came (Hackworth, 3 H. Digest of International Law, Vol. III, pp. 289-297). This position is in accord with the opinion of Attorney General Wickersham in 1910 (28 Op. Atty. Gen. 504 (1910)), also by many decisions of the courts (Camardo v. Tillinghast, 29 F. 2d 527 (C. C. A. 1,

1928); *U. S.* v. *Eliasen*, 11 F. 2d 785 (D. C. Wash. 1926)). The Board of Immigration Appeals in several unreported decisions has also adopted the same view. It is concluded upon the basis of all the evidence of record and the above-cited authorities that the respondent has overcome the presumption of loss of citizenship under the provisions of the second paragraph of Section 2 of the Act of March 2, 1907.

As previously stated, the Act of March 2, 1907 was repealed by Section 504 of the Nationality Act of 1940, effective January 14, 1941. Section 404 (c) of that Act states that a naturalized citizen of the United States shall lose his nationality by residing continuously for five years in any foreign state except as provided in Section 406. However, Section 409 of the Nationality Act continued the presumption of loss of nationality under Section 404 (c) of the Act, as well as under the second paragraph of Section 2 of the Act of 1907 until October 16, 1946.

Section 406 of the Nationality Act, as amended by the Act of December 24, 1942 (56 Stat. 1085: 8 U. S. C. 806) which added subsection (h) to Section 406, provides that Section 404 (c) of the Nationality Act of 1940 shall have no application to a person who is a veteran of the Spanish American War or of the World War, his wife, minor children or dependent parents. The Nationality Act of 1940 was repealed by Section 403 of the Immigration and Nationality Act, effective December 24, 1952. The latter Act also contains the provision for loss of citizenship by a naturalized citizen of the United States upon five years residence in a foreign state other than

that of which he was formerly a national or in which he was born (Sec. 352 (a) (2)) and also exempts World War Veterans from the loss of nationality by reason of such foreign residence whether before or after the effective date of that Act.

The respondent testified that he enlisted in the United States Army in May, 1918 and was honorably discharged. He has presented his Honorable Discharge from the United States Army, a photostatic copy of which was entered into evidence as Exhibit 18, showing that he was honorably discharged at Camp Sherman, Ohio on August 13, 1919. In view of the foregoing, it is concluded that the respondent did not lose his nationality under the provisions of the Nationality Act of 1940 or the Immigration and Nationality Act, and that he is still a citizen of the United States. It has already been concluded that he has overcome the presumption of loss of citizenship under the Act of March 2, 1907. Accordingly, the charge of deportability contained in the warrant of arrest is not sustained.

In view of the foregoing, it is deemed that any discussion of other factors in this case is unnecessary.

Findings of fact: Upon the basis of all the evidence presented, it is found:

1. That the respondent, a native of Italy, became a citizen of the United States by naturalization at Cleveland, Ohio on March 18, 1920 under the provisions of Section 4, Sub Division 7, of the Act of May 9, 1918.

2. That the respondent last entered the United States at San Antonio, Texas on

April 10, 1953, on which occasion he was admitted as a citizen of the United States.

3. That the respondent is the holder of a United States Passport, No. 471803, issued to him at Washington, D. C., on June 28, 1951.

4. That the responded resided in Mexico from January 20, 1935 until April 10, 1953.

5. That the respondent went to Mexico in order to make investments and buy land there.

6. That the respondent's wife and family resided in the United States during the entire period of time he was in Mexico.

7. That the respondent made periodic visits to the United States between January 20, 1935 and April 10, 1953.

8. That the respondent, while in Mexico, always intended to return to the United States.

9. That the respondent enlisted in the United States Army on May 26, 1918 and and was honorably discharged therefrom on August 13, 1919.

Conclusions of law: Upon the basis of the foregoing findings of fact, it is concluded:

1. That the respondent has successfully rebutted the presumption of loss of citizenship found in the second paragraph of Section 2 of the Act of March 2, 1907.

2. That the respondent did not lose his nationality of the United States under the provisions of Section 404 (c) of the Nationality Act, he being within one of the exempt categories of Section 406 (h) of that Act.

3. That the respondent did not lose his nationality of the United States under the provisions of Section 352 (a) (2) of the Immigration and Nationality Act, he being

within one of the exempt categories of Section 354 (1) of that Act.

4. That the respondent is *not* subject to deportation in that, at the time of entry, he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit: Aliens who are immigrants not in possession of a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document and not exempted from the presentation thereof by said Act or regulations made thereunder.

Order: It is ordered that the proceedings in this case be terminated.

B. DECISION OF BOARD OF IMMIGRATION APPEALS

Upon consideration of the entire record, it is ordered that decision of the special inquiry officer terminating proceedings be and the same is hereby approved.

Case No. II

MATTER OF R——, IMM. FILE No. E–081204

DECISION OF BOARD OF IMMIGRATION APPEALS

The case is before us by certification.

The respondent is a 57-year-old single male, a native and citizen of Italy who has resided in the United States since his lawful admission for permanent residence on June 4, 1914.

The special inquiry officer found the respondent not deportable on either of the grounds stated above and ordered termination of proceedings. The Commissioner of the Immigration and Naturalization Service opposes this action and asks

that the respondent be ordered deported on each of the grounds stated above.

Deportation of the respondent on the first charge is sought under that portion of Section 241 (a) (4) of the Immigration and Nationality Act, 8 U. S. C. A. 1251 (a) (4), which makes deportable an alien "who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of misconduct, * * *." The Service is of the opinion that respondent has been convicted of crimes involving moral turpitude on three occasions. The special inquiry officer found the evidence established conviction of only one such crime—that being the crime summarized after numeral (2) in the caption. It is the one for which respondent was convicted in Pennsylvania in 1926 on two indictments charging four offenses—fraudulent conversion; larceny; receiving stolen goods; and conspiracy to steal. As a result of the conviction, the respondent received a sentence of one year. He served this sentence and thereby received a legislative pardon for the crimes. There is a question as to whether he was convicted for all four offenses, and if not, for which particular offense or offenses. The issue is not important. Even if he had been convicted for all four offenses, it would, for deportation purposes, have been regarded as conviction for one crime since all the offenses were based upon actions arising from a single scheme of misconduct occurring on May 29, 1925, when respondent appropriated $1,800 belonging to Mario Pagni. Conviction for any of the offenses involves moral turpitude.

Counsel is of the opinion that this conviction cannot be the basis for deportation proceedings because of the legislative pardon respondent received after serving his sentence. We have previously considered a similar contention and ruled that while a legislative pardon, under the law previous to the Immigration and Nationality Act of 1952, had been effective to avert deportation, one who held such a pardon and was therefore, prior to the Immigration and Nationality Act, immune from deportation, could nevertheless be deported under the Immigration and Nationality Act which specifically provides that a pardon to avert deportation must be issued by the President of the United States or by the Governor of any of the several States—a provision we have held is retroactive (*Matter of R——*, Int. Dec. 518; 241 (b), Immigration and Nationality Act, 8 U. S. C. A. 1251 (b)).

For the second of the two convictions of crime involving moral turpitude which must be found to exist before an alien is deportable, the Service relies upon a Magistrate's Order in 1924 fining respondent $100 or imprisonment for 60 days in the workhouse in Pittsburgh following an arrest as a suspicious person and "bunco" in Pittsburgh, Pennsylvania, on June 3, 1924. The Service contends that this incident resulted in respondent's conviction for the crime of larceny—the crime set forth after numeral (3) in the caption. The special inquiry officer concluded that the Service had failed to bear its burden of establishing that there had in fact been a conviction

of larceny. The matter has been fully discussed by him on pages 3 and 7 of his order. We concur in his finding. We note also counsel's uncontradicted statement that "bunco" is not a crime in Pennsylvania and that larceny is not a minor offense which may be disposed of summarily by a Magistrate. The matter requires no further discussion. The conviction in question cannot therefore serve as a ground for deportation.

Finally, the Service relies upon respondent's conviction in 1942 for violation of the Mann Act as the second of the two crimes involving moral turpitude which must be found to exist to render respondent subject to deportation. If it be found, as was found by the special inquiry officer, that the conviction does not involve moral turpitude, then it must be concluded that this record establishes the conviction of only one crime involving moral turpitude and the charge based on the criminal grounds must necessarily fail.

The Mann Act conviction occurred on July 30, 1942, when respondent was found guilty of the "offenses" charged in count one of a three count indictment. He was sentenced to six months' imprisonment and fined $1,500. Count one which was based on 18 U. S. C. A. 398, now 2421, charges respondent with aiding and assisting in obtaining transportation and in transporting from New Jersey to Florida, one Louise Abate, "with intent and purpose * * * to induce, entice and compel * * * (her) to engage in an immoral practice, to wit, the practice of illicit sexual intercourse with him, * * *". We must determine

whether this conviction involves moral turpitude. He was found not guilty on counts two and three.[1]

The special inquiry officer held that moral turpitude was not involved in the conviction. He found that the fundamental crime charged was the practice of illicit sexual intercourse between parties whom there was nothing to show were married and that the offense in essence amounted to the commission of fornication, a crime not involving moral turpitude. This Board has previously ruled in a similar manner, in a case not reported and not available to the special inquiry officer (*Matter of K——*, 56137/320 (1944)).

The Service argues that *Matter of K——*, was incorrectly decided. It is argued that the inherent nature of the crime spelled out by the statute is such as to require a finding of moral turpitude in every conviction. The Service theory is based upon the belief that the phrase in the indictment charging the commission of "other immoral practice" (which here the Service equates with "other immoral *purposes*"), requires a finding of action that amounts to more than simple fornication before a conviction can be obtained. In other words, the conduct must be

[1] Count two was laid under 18 U. S. C. A. 399, now 2422. It charged respondent with *persuading* the female in question to pass state lines "for the immoral purpose of illicit sexual intercourse with him." Count three was laid under the same section as was count one and charged the respondent with *causing* the female to be transported "with intent to induce, entice, and compel, the said Louise Abate to engage in the immoral practice of illicit intercourse with him."

in the nature of prostitution, concubinage, seduction, or corruption from virtue to obtain a conviction. Furthermore, it is urged that fornication should be found to be a crime involving moral turpitude.

Counsel argues that the statute, by its inherent nature, does not define a crime necessarily involving moral turpitude; that respondent was not convicted for transporting a woman for purposes of prostitution or commercial vices; and that the specific act of which he was convicted amounts to no more than a conviction for inducing a woman to commit an act or acts of fornication, a crime not involving moral turpitude. Furthermore, counsel urges that the offense is less blameworthy than simple fornication since the gist of the offense was assisting the woman to obtain transportation and it was unnecessary to establish that there had actually been sexual relations.

In view of the Commissioner's urgent representations that the *Matter of K——*, was incorrectly decided, and that the crime in question involves moral turpitude, we shall deal fully with the problem.

In determining whether a crime involves moral turpitude, the courts have given us certain standards which we *must* follow. (*United States ex rel Mylius* v. *Uhl*, 203 Fed. 152, S. D. N. Y., affd. 210 Fed. 860, C. A. 2; *United States ex rel Robinson* v. *Day*, 51 F. 2d 1022, C. A. 2; *United States ex rel Manzella* v. *Zimmerman*, 71 F. Supp. 534, E. D. Pa.; *United States ex rel Teper* v. *Miller*, 87 F. Supp. 285, S. D. N. Y.; *Vidal Y Planes* v. *Landon*, 104 F. Supp. 384 (1952); 37 O. A. G.

293; *Matter of S——*, 2 I&N Dec. 353, 357, 361; *Matter of E——*, 2 I&N Dec. 134, 145.)

The test requires us to first determine what law or specific portion thereof has been violated (*United States ex rel Teper* v. *Miller, supra,* and cases cited there), and then, without regard to the act committed by the alien, to decide whether that *law inherently* involves moral turpitude (*United States ex rel Mylius* v. *Uhl, supra*); that is, whether violation of the law "under any and all circumstances", would involve moral turpitude (*United States* v. *Zimmerman, supra; Matter of S——, supra,* pp. 357, 361; *Matter of E——, supra,* 145). If we find that violation of the law under any and all circumstances involves moral turpitude, then we *must* (*United States ex rel Teper* v. *Miller, supra*) conclude that *all* convictions under that law involved moral turpitude although the "particular acts evidence no immorality" (*United States ex rel Mylius* v. *Uhl, supra*). If, on the other hand, we find that the law punishes acts which do not involve moral turpitude as well as those which do involve moral turpitude, then we *must* rule that *no* conviction under that law involves moral turpitude, although in the particular instance conduct was immoral (*United States ex rel Robinson* v. *Day, supra*).[2]

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[2] The rule set forth exists because a standard must be supplied to administrative agencies; it eliminates the burden of going into the evidence in a case; it eliminates the situation where a nonjudicial agency retries a judicial matter; and it prevents the situation occurring where two people convicted under the same specific law are given different treatment because one indictment may contain a fuller or

To determine what law has been violated, we may peruse the indictment, conviction and sentence (*United States ex rel Teper* v. *Miller, supra*). These documents reveal that respondent was convicted under that portion of 18 U. S. C. A. 398 which reads as follows, except for the matter in parentheses which is a part of the statute, but not found in the indictment.

> Any person who shall knowingly * * * aid or assist in obtaining transportation for, or in transporting, in interstate * * * commerce, * * * any woman or girl * * * with the intent and purpose to induce, entice, or compel such woman or girl (to become a prostitute or to give herself up to debauchery, or) to engage in any other immoral practice * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, * * *.

Section 398 of Title 18 U. S. C. A., 1926, sets forth several immoral acts—prostitution, debauchery, other immoral purposes or practices; several ways by which transportation of a female to engage in immoral acts can be effected—aiding in transporting, assisting in transporting, transporting, or causing to be transported; and several intents—to make a female a prostitute, to debauch, to commit an immoral act with her; to induce, entice or compel her, to be a prostitute,

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different description of the same act than the other indictment; and makes for uniform administration of law (*United States ex rel Mylius* v. *Uhl, supra*).

to engage in debauchery, or to commit an immoral act.

Count one sets forth nine ways in which the statute could have been violated. Three acts are charged in the conjunctive as to transportation; and three are charged in the conjunctive as to intent. As to transportation, respondent was charged with, (A) aiding in obtaining transportation, and (B) assisting in obtaining transportation, and (C) transporting in interstate commerce. As to intent, he was charged with (1) inducing, and (2) enticing, and (3) compelling the performance of the immoral act.[1] Any one combination of the lettered acts with those preceded by a numeral would have been sufficient to establish a violation of Sec-

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[1] Respondent is charged in the conjunctive with the commission of acts and the possession of intents set forth in the statute in the disjunctive. Such pleading is proper to avoid an acquittal by reason of any unforeseen lack of harmony between allegations and proof; and proof of the commission of *any one* of the acts and possession of *any one* of the intents is sufficient to obtain conviction. (*Malaga* v. *United States*, 57 F. 2d 822, C. A. 1; *Blain* v. *United States*, 22 F. 2d 393, 395, C. A. 8; *United States* v. *Mellor*, 71 F. Supp. 53, D. Neb., affd. 160 F. 2d 757, C. A. 8, cert. denied, 331 U. S. 848; see also *United States* v. *Brothman*, 93 F. Supp. 924, S. D. N. Y.; *District of Columbia* v. *Hunt*, 163 F. 2d 833, C. A. D. C.; *Fredrick* v. *United States*, 163 F. 2d 536, 544, C. A. 9, cert. denied 332 U. S. 775; *Crain* v. *United States*, 162 U. S. 625, 40 L. ed. 1097.)

Under such an indictment, the charges which are not supported by the evidence need not be submitted to the jury—only such issues as are supported by the evidence should be submitted (*Mellor* v. *United States*, *supra*, 160 F. 2d 757, 763 C. A. 8). We are precluded from going behind the record to determine what issues were presented to the jury (*United States ex rel Teper* v. *Miller*, *supra*).

tion 398, i. e. (A) and (2), aiding in obtaining transportation with intent of enticing the performance of the immoral act would be an offense, etc. (cases cited in footnote 3).

Even though violation of Section 398 could have been accomplished under more than one of the conditions specified in the Act, only one violation results, and one cannot be convicted under Section 398 on two counts charging the same transportation of the same woman in one count for the purpose of prostitution and in the other for the purpose of illicit intercourse. Conviction and punishment can be had on only one count.[4] (*Roark* v. *United States*, 17 F. 2d 570, C. A. 8; *Malaga* v. *United States*, 57 F. 2d 822, C. A. 1; *Caballaro* v. *Hudspeth*, 114 F. 2d 545, C. A. 10; *Blain* v. *United States*, 22 F. 2d 398, C. A. 8; *Mellor* v. *United States, supra; United States* v. *Lewis*, 110 F. 2d 460, 462, C. A. 7, cert. denied 310 U. S. 634. But See *United States* v. *Fleenor*, 177 F. 2d 485, C. A. 7; which does not discuss cases which are apparently contrary; and *Malaga* v. *United States, supra*, which uses language indicating there is more than one offense under Section 398, but which terms a broad indictment similar to that herein as defining one offense. (*United States* v. *Lewis, supra*, 462, and *Mellor* v. *United States, supra*, also characterize an indictment similar to that herein as defining one offense under Section 398.)

It is clear therefore that respondent was convicted of only one offense. What was that of-

[4] There can be conviction for offenses arising out of the same act if there is a violation of Section 398 *and* 399 (*La Page* v. *United States*, 146 F. 2d 536, C. A. 10).

fense? It seems of little moment whether respondent was convicted for the act or acts of (1) aiding in obtaining transportation, or (2) assisting in obtaining transportation, or (3) in transporting the female. However, it might be of importance if he were convicted for planning the immoral act with the intent to *compel*, rather than induce or entice its commission. Whether such a conviction is more culpable in morals than one for *inducing* the performance of the act, we need not decide, for we conclude that the conviction involved must be considered to have been for the offense of transporting a female with the intent to *induce* or *entice* her to engage in the immoral practice represented by illicit intercourse. We reason as follows.

Legally, the count on which respondent was indicted creates only one offense. The offense could have been committed by any *one* of the nine acts set forth in the count. It was necessary to find only the existence of one act to obtain a conviction. The jury rendered a general verdict of guilty. We cannot go behind the record to determine what specific issues were presented to the jury and what specific act or acts they found to exist (*United States ex rel Teper* v. *Miller, supra*). Since the verdict was a general one and did not specify the act or acts on which it rested, it cannot be determined that respondent was not convicted for the acts which do not relate to compelling (*Stromberg* v. *California*, 283 U. S. 359, 367–370, 75 L. ed 1117; *Terminiello* v. *Chicago*, 337 U. S. 15, 93 L. ed. 1131). The finding that respondent was guilty of the "offenses" on count one, was of course surplusage,

for there is only one offense. (Even if this finding could be given weight, it is meaningless for the purposes of this discussion, for it may have referred to any two or more of the six acts set forth which do not involve the intent "to compel".) Compulsion is not a material element of the crime (cases cited *infra*). The burden of establishing that conviction was for a particular act is upon the Government. On this record it cannot be found that the transportation was for "compelling" the woman to engage in unlawful sexual intercourse. Because of these facts, we are not justified in drawing the inference most unfavorable to the alien. We must in fact draw that most favorable to him. We must assume that he was convicted for transportation for the purpose of inducing or enticing the commission of the act.

Does the crime we have defined in this case inherently involve moral turpitude? If we find that situations not involving moral turpitude are punishable by the phrases with which we are concerned, then it becomes our duty to find that the crime defined does not involve moral turpitude (*Matter of S——*, 2 I&N Dec. 361).

While the primary purpose of the Mann Act was to deal with white slavery, the statute "enumerates the prohibited acts in broad language capable of application beyond that indicated by the legislative framers" (*Mortenson* v. *United States*, 322 U. S. 369, 377, 88 L. ed. 1331). There can therefore be conviction where the elements of commercial vice or pecuniary motive are absent (*Caminetti* v. *United States*, 242 U. S. 470, 61 L. ed. 442; *United States* v. *Reginelli*, 133

F. 2d 595, C. A. 3, cert. denied, 318 U. S. 783). The offense is completed at the moment of transportation across state lines, the necessary intent or purpose being present (*Neff* v. *United States*, 105 F. 2d 688, C. A. 8). It is not necessary that the immoral act be completed or attempted (*United States* v. *Brand*, 229 Fed. 847, S. D. N. Y.). It is not necessary to establish that the female was seduced from virtue; that she was corrupted; or that she has been previously chaste. The statute is not an anti-seductive one and it only incidentally concerned the character for chastity or unchastity of those transported (*Pine* v. *United States*, 135 F. 2d 353, C. A. 5, cert. denied, 320 U. S. 740, 88 L. ed. 439; See *United States* v. *Mellor, supra*). Lack of consent is not an element. "Congress set out in the Mann Act to deal with cases which frequently, if not normally, involve consent and agreement on the part of the woman to the forbidden transportation" (*Gebardi* v. *United States*, 287 U. S. 112, 72 L. ed. 206; *Cleveland* v. *United States*, 329 U. S. 14, 91 L. ed. 12; *Miller* v. *United States*, 95 F. 2d 492, C. A. 9; *Morrow* v. *United States*, 201 F. 2d 363, C. A. 5; *United States* v. *Mellor, supra; United States* v. *Jamerson*, 60 F. Supp. 281, N. D., Iowa; *Burgess* v. *United States*, 291 Fed. 1002 (1924); *United States* v. *Williams*, 55 F. Supp. 375, D. Minn.). A consideration of all the cases makes it quite clear that the crime defined by the language with which we are concerned can be transportation with the intent to induce the commission of a simple act of fornication—an "isolated non-commercial venture based on impulse and reciprocating passion" (*United States* v. *Jamerson*,

supra, pp. 261, 264; *United States* v. *Fleenor*, *supra*, p. 484; *Elrod* v. *United States*, 266 Fed. 55, C. A. 6; *Johnson* v. *United States*, 215 Fed. 679, C. A. 7; *Sloan* v. *United States*, 287 Fed. 91, C. A. 8; *Qualls* v. *United States*, 149 F. 2d 891, C. A. 5; *Neff* v. *United States*, 105 F. 2d 688, C. A. 8; *Carey* v. *United States*, 265 Fed. 515, C. A. 8). The cases cited by the Service which would indicate that more than an act of fornication is required are not authoritative on the issue.

Not every violation of law involves moral turpitude. Moral turpitude is found in those acts or omissions which are so far "contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons" (*Matter of D*——, 1 I&N Dec. 190, 194). Ordinarily, moral turpitude is not found in conduct, which before it was made punishable as a crime, was not generally regarded as morally wrong, or as offensive to the moral sense of the community (*Coykendall* v. *Skrmetta*, 22 F. 2d 120, C. A. 5).

Does fornication involve moral turpitude? It is necessary to determine this because if fornication, a crime which may be punished under the language of the indictment with which we are concerned, does not involve moral turpitude, then it becomes our duty to rule that the conviction herein was not a crime inherently involving moral turpitude. Fornication is defined as illicit sexual intercourse (37 C. J. S. 117). Administratively, it had uniformly been held

that fornication does not involve moral turpitude. The Solicitor of Labor, in a memorandum dated April 29, 1926, stated "It can scarcely be maintained logically that simple fornication manifests on the part of its perpetrators such personal depravity or baseness as warrants the holding that it is a crime which involves moral turpitude." We have been unable to discover any departure from this view (*Matter of D——*, *supra; Matter of K——*, *supra;* see *Matter of O——*, 2 I&N Dec. 840).

Fornication—unlawful or illicit sexual intercourse—was not punishable at common law unless it was accompanied by public acts of indecency (37 C. J. S. 117; L. R. A., 1916, C. 653). Today, fornication is not a criminal offense in the absence of statutory change (37 C. J. S. 119). Some states have not made the statutory change and "occasional illicit intercourse" is not a crime in such state (*Warner* v. *State of Indiana*, 202 Ind. 479, 175 N. E. 661, 74 A. L. R. 1357; *United States ex rel Huber* v. *Sibray*, 178 Fed. 144, C. C., Pa.; reversed on other grounds 185 Fed. 401, C. A. 3; *Ex Parte Rocha*, 30 F. 2d 823, S. D. Tex.) In some states there have been enacted statutes which punish fornication only if it be committed by parties dwelling together in the same place in the manner of husband and wife for some period of time (37 C. J. S. 121; *Warner* v. *State, supra; Ex Parte Rocha, supra*). Elsewhere, it may be a crime only if committed between relatives so that it amounts to incest (*State* v. *Manley*, 74 A. 231, 82 Vt. 556).

The Service request that we find fornication is a crime involving moral turpitude, is based

upon the inability to find court cases holding that fornication does not involve moral turpitude.

No court in recent years had directly ruled upon whether fornication is a crime involving moral turpitude (the language in *Pollard* v. *Lyon*, 91 U. S. 225, 23 L. ed. 308 (1875) is dicta and as far as we know, has not been relied upon by any Federal court); however, the courts have, in many instances where fornication was involved, taken action which is consistent only with a finding that fornication did not involve moral turpitude.

This conclusion follows from the fact that one who has committed an act involving moral turpitude is ordinarily denied naturalization on the ground that good moral character has not been established (*In re Paoli*, 49 F. Supp. 128; *In re Nybo*, 34 F. 2d 151, affd. 42 F. 2d 727, C. A. 6; *In re Bookschnis*, 61 F. Supp. 751, D. Oregon; *Ralich* v. *United States*, 185 F. 2d 784, C. A. 8). Both in determining what constitutes good moral character and whether a crime involves moral turpitude, judgment is based upon the court's determination as to what is the generally accepted moral convention current at the time (*United States* v. *Francioso*, 164 F. 2d 163, C. A. 2; *In re Markiewicz*, 90 F. Supp. 191, W. D. Pa.; *Repouille* v. *United States*, 165 F. 2d 152, C. A. 2). Courts have found to be persons of good moral character, individuals who have committed illicit sexual acts despite the occurrence of these acts in the periods during which good moral character was required to be established. Thus, in *Schmidt* v. *United States*, 177 F. 2d 450, C. A. 2, the court

held that one who engaged in sexual intercourse with single and unmarried women on occasions—conduct that was "concupiscent and promiscuous, but not adulterous," did not engage in conduct that would cause the "common conscience" of man to hold the acts deprived him of good moral character (see also *Petition of R—*, 53 F. Supp. 969, D. Mass.; *United States* v. *Rubia*, 110 F. 2d 92, C. A. 5; *Application of Murra*, 178 F. 2d 670, C. A. 7; *United States* v. *Manfredi*, 168 F. 2d 752, C. A. 3; *United States* v. *Palombella*, 168 F. 2d 903 (C. A. 3)).[5] Furthermore, it is some importance to note that under the Immigration and Nationality Act Congress for the first time set up standards of good moral character. The commission of adultery was listed as requiring a finding that good moral character was lacking. No mention was made of fornication. As pointed out by counsel, it would be most incongruous for an act of illicit sexual intercourse on the part of an unmarried alien to be regarded as a crime involving moral turpitude and the basis for deportation when one who committed such an act could be granted the priceless gift of United States citizenship.

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[5] Respondent's petition for naturalization filed in 1944 was denied. While the reason for the denial could have been stated with greater clarity, it was not based on the ground that he had committed an immoral act or had been convicted under the Mann Act. It appears that the court, because the record reflected derogatory information concerning the respondent besides the conviction, gave to the fact that conviction existed, a weight, he would not otherwise have given it, and as a discretionary matter, denied the petition for naturalization (*Petition of Reginelli*, 86 F. Supp. 509, N. J.).

It thus appears that the mores of the community do not to this day require punishment of furtive illicit intercourse or private immoral indulgence of the individual. It would seem that moral turpitude should not be attached to the commission of an act which though immoral is not even regarded as a crime in some communities, and is one which the courts have held would not cause the "common conscience" to strip its perpetrator of good moral character.

We conclude therefore that under the language of the law which resulted in respondent's indictment and conviction, convictions for simple fornication are possible; that simple fornication does not involve moral turpitude; and that the language therefore does not inherently define a crime involving moral turpitude.

The Service argues that if it be concluded that fornication is a crime not involving moral turpitude, the instant conviction would still be one involving moral turpitude because respondent is charged with the *practice* of the illicit sexual act and the repetition of the act clothes it with the moral turpitude that a simple act of fornication does not have. No authority is cited for this view. The Service used the word "practice" interchangeably with "purpose" (*supra*). The courts have done likewise (*Carey* v. *United States*, 265 Fed. 515, 516, C. A. 8; *United States* v. *Lewis*, 110 F. 2d 460, C. A. 7, cert. denied 310 U. S. 634, 84 L. ed. 1404). No special significance need be given the word "practice." It requires no deeper meaning than that of "act" or "type of conduct." It does not necessarily imply a series of acts. To obtain conviction, proof that

transportation was with the intent to engage in one act of fornication would have been sufficient. Furthermore, the act specified herein is "the practice of *illicit sexual intercourse.*" If the act be one of simple fornication, repetition of the act with the same woman would not make the act more or less base. "One, two, or a half dozen acts of illicit intercourse would not of themselves constitute concubinage" (*United States* v. *Zee Lloya*, 35 Fed. 493, S. D. Ala. (1888)). The crime for which respondent was convicted does not involve moral turpitude. The Service has failed to establish that he has been convicted of two crimes involving moral turpitude. The charge must therefore fall.

The second charge is based on Sections 241 (a) (12) and 212 (a) (12) of the Immigration and Nationality Act (8 U. S. C. A. 1251 (a) (12) and 1182 (a) (12)). This matter is discussed by the special inquiry officer on pages 8 and 9 of his order. Briefly, the charge is that after his entry, the respondent behaved in such a manner as to make him a member of a class excluded from entering the United States. This excludable class is defined in Section 212 (a) (12). As attempt is made to apply the section to this case, it relates to a person who has "procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution or for any other immoral purpose." Is respondent one who attempted to procure a person for the purpose of prostitution or for any other immoral purpose? We find he is not such a person. To sustain the second charge, it is not necessary to establish that there has been a conviction for any violation of

law. Respondent's conviction under the Mann Act was therefore merely incidental. However, the incident which forms the basis for the conviction is relied upon as establishing that the respondent procured or attempted to procure or import a prostitute or person for purposes of prostitution or for other immoral purposes. Here it becomes necessary to examine the facts.

The facts will be taken from the summary by the United States Circuit Court of Appeals for the Third Circuit in the *United States.* v. *Reginelli,* 133 F. 2d 595, C. A. 3, cert. denied, 318 U. S. 783; which considered respondent's appeal from the Mann Act conviction. Respondent, a resident of New Jersey, left for a visit to Miami, Florida, having apprised the woman in the case, also a resident of New Jersey, of his contemplated trip. En route, he sent her a telegram in endearing terms and upon arriving in Miami, he again telegraphed her in the like vein and informed her of his arrival. The next day, he telegraphed her giving his hotel address, expressing his wish that she were there and stating that he would call her by telephone that evening, which he did. From then until February 2, 1942, he called her by telephone four additional times and talked with her on each occasion. One of the matters discussed was the prospect of her going to Miami while he was there. Acting in pursuance of an understanding arrived at with respondent by phone, the woman made the trip from New Jersey to Florida by plane upon a ticket which respondent himself had procured and paid for as he had told her he would do. Upon her arrival at the airport, in Miami, she was met by

respondent and with him rode in his automobile to his hotel in Miami Beach. She went to his room in the hotel and continued to live there during the whole of her ten-day sojourn in Miami. During that time she and respondent occupied the same bed in his room and had sexual relations.

These facts in the main were established by testimony of the woman. She also testified that the idea of her going to Florida to join the respondent originated with her and that respondent had frowned upon it and also he had objected to her going to his room when they arrived at the hotel in Miami. The jury "disbelieved or deemed inconsequential" this portion of the woman's testimony tending to exculpate respondent. The Circuit Court stated that in any event the portion of the woman's testimony freeing the defendant of an unlawful purpose was "at best but slight evidence of what was actually in the defendant's mind, so that even accepting the whole of her testimony at face, it was still for the jury to determine from all the proven facts what the defendant's purpose was in having the woman transported to Miami. This review of the facts clearly shows no more than that respondent engaged in extra marital relations with a willing woman over a ten-day period. Evidence adduced at the deportation hearing reveals no more. Does such conduct constitute an "immoral purpose" under Section 212 (a) (12)? We believe not.

The words "other immoral purpose" are, in the immigration law, words of art. (*Hansen* v. *Haff*, 291 U. S. 557 (1934).) It has been settled that the words "other immoral purpose" in the

phrase "for the purpose of prostitution or any other immoral purpose" mean an act of a like character with prostitution, and extra marital relations short of concubinage fall short of that description. In other words, the intent to have the illicit relations that were casual was not enough to bring a person into the category of those persons who were coming for an "immoral purpose". This was the meaning given the words "other immoral purpose" in the law prior to the Immigration and Nationality Act which is involved in the instant proceedings.

No change in this regard was made by the Immigration and Nationality Act. The Committee of the Judiciary whose investigation of the immigration system furnished the basis for the Immigration and Nationality Act of 1952, made the following recommendation concerning the excludability of immoral aliens:

> It is the recommendation of the subcommittee, however, that the excludable class of immoral aliens should be enlarged to include persons who have practiced prostitution or who have procured or attempted to procure or import prostitutes or other persons for immoral purposes, as well as those who are so engaged at the time of entry as provided in the law at present. This excludable class should include persons who seek to enter the United States to engage in *any illicit sexual act* or other immoral act, whether that purpose be the sole, principal or incidental purpose of their entry. This latter provision will overcome the decision of the Supreme Court in *Hansen* v. *Haff*. [Italics added.] (Report #1515, 81st Cong., 2d Sess., p. 358.)

We have previously decided that the change recommended by the Committee was not adopted by Congress when the Immigration and Nationality Act was passed (*Matter of B_____*, Int. Dec. 421). The words "other immoral purpose" in the immigration law remain words of art and specify acts of a like character with prostitution, a requirement not satisfied by extra marital relations short of concubinage. Concubinage has not been established. Can it be said that respondent was one who procured a person for the purpose of prostitution or acts of a like character with prostitution? Our answer is in the negative. Prostitution is the practice of a female offering her body to indiscriminate intercourse with men (73 C. J. S. 224). Unless otherwise defined by statute, it is distinguished from sexual intercourse confined to one man (*People ex rel Colletti* v. *Morehead*, 50 N. Y. S. 2d 78; *Commonwealth* v. *Kaniper*, 3 Pa. Co. 276; *Cleveland* v. *United States*, 329 U. S. 14, 17, 91 L. ed. 12; *United States* v. *Zee Lloya, supra*). We find no evidence in the record that the respondent procured the woman for the purpose of having her offer her body to indiscriminate intercourse with men. The second charge is clearly not sustained. Any other conclusion would rewrite the law to make deportable any alien who performed one act of fornication at any time after entry. No deportable ground is set forth in this record. The proceedings should be terminated.

Order: It is ordered that the decision of the special inquiry officer terminating proceedings be affirmed.

Case No. III

MATTER OF B--------, IMM. FILE NO. A-2544646

A. DECISION OF SPECIAL INQUIRY OFFICER

Discussion as to deportability: Hearing in this case was reopened in compliance with order of the Board of Immigration Appeals dated December 28, 1953, to afford the respondent an opportunity to apply for suspension of deportation.

The record shows that the respondent is a 57-year-old married male, a native of Italy and last a citizen of the United States, who was first admitted to the United States for permanent residence at New York, New York, on May 25, 1914. United States citizenship granted to the respondent in U. S. District Court, Cleveland, Ohio, on November 11, 1929, was cancelled by order of that Court on April 12, 1939, on the ground of fraud which erased the naturalization ab initio. His last entry into the United States occurred at New York, New York, on March 1, 1930, following a visit to Italy at which time he was admitted as a United States citizen (Exhibits 3, 4 and 5).

The record establishes that the respondent was arraigned in Common Pleas Court, Cuyahoga County, Cleveland, Ohio, charged with the crime of Perjury committed on or about April 7, 1932; was convicted, and on June 2, 1932, was sentenced to imprisonment in the Ohio State Penitentiary, Columbus, Ohio, for an indefinite period from which institution he was released on December 1, 1936, upon receiving a commutation of sentence from the Governor of Ohio (Exhibit 8).

The factors as to alienage and deportability have been adjudicated and a warrant directing deportation to Italy was issued on August 19, 1953. In view of the foregoing, the findings of fact and conclusions of law as to deportability contained in our order of March 20, 1953, will not be re-stated.

Discussion as to eligibility for suspension of deportation: The respondent has applied for suspension of deportation under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act (Exhibit 10). The record establishes that he was legally married to a native-born citizen of the United States at Brooklyn, New York, on April 16, 1922 (Exhibits 11 and 18). Neither had been previously married. They have five children, the youngest being 23 years of age. Two of these children were born in Brooklyn, New York, and the other three in Cleveland, Ohio. They are all self-supporting. Respondent testified that his wife is totally dependent upon him for support and for the past eighteen or nineteen years has been a semi-invalid suffering from Sciatic Rheumatism, High Blood Pressure, and Diabetes; that she is confined to her bed two or three days a week; and that her condition is such that she requires partial care. A statement as to her physical condition from Dr. V. D. Ippolito, the family physician, was entered into evidence as Exhibit No. 16. He testified that for the past two years he has been employed as a tire salesman by the Cardinal Tire and Rubber Company, Cleveland, Ohio, and earns $65 a week (Exhibit 13), previous to which he had been employed for periods of about six months each as a Used Car

Salesman and as Partner in a Fish Market. He also testified that from about 1947 to 1950 he was a partner in the Lapuma-Spumoni Company, Cleveland, Ohio. In addition to his weekly wages he has a monthly income of $80 derived from rented property, and $15 a week paid by his son for board and lodging. His assets consist of an equity of about $15,000 in real property worth $22,000; household furniture worth, $2,000; and an equity of $2,900 in a Lincoln Automobile worth about $3,800. He also claims to owe about $4,000 in personal debt.

Exhibit 6 is report of Federal Bureau of Investigation, No. 137835, which respondent stated relates to him. This record indicates that his only conflict with the police authorities since his release from imprisonment in 1936 appears to have occurred on May 28, 1945, when he was held for investigation by the Pittsburgh Detective Bureau, and on August 25, 1950, when he was held for inquiry by the Cleveland Police Department. The report from the Cleveland Police Department, indicating that he has no criminal record, which was submitted, was entered into evidence as Exhibit 12. In view of the evidence of record, this report is, apparently, erroneous. There is no indication that the respondent has ever been a member of any subversive organizations.

The affidavits of ten persons have been submitted to establish respondent's good moral character for a period of over ten years (Exhibits 14, 15, 17, and 19). A report of a neighborhood Character Investigation conducted by this Service covering the last ten years is favorable to the respondent (Exhibit 20).

The file in respondent's case indicates that he has been at liberty under bonds in the sum of $5,000 and conditional parole executed on March 20, 1953, and on May 17, 1954 at Cleveland, Ohio. The bonds and conditional parole executed require in part:

> A. That subject alien shall conduct himself in a lawful and orderly manner; and shall not associate or consort with known criminals, or persons believed by him to be criminals, or persons engaged in criminal activities;
>
> B. That said alien shall not frequent places or establishments which he knows or has reason to believe criminals or persons with a criminal record congregate;
>
> C. * * *

Exhibit 9 consists of sworn statements taken from the respondent by an officer of this Service at Cleveland, Ohio, on January 20 and on April 19, 1954, in connection with his activities, associates, and compliance with the conditions of his bonds and conditional parole. The respondent testified that once or twice a week he visits one or two barber shops where he might meet persons whom he knows to have criminal records, which persons also have business in these shops and happen to be in or to come in same while he is present. He denied that he frequented these shops for the purpose of consorting or associating with such persons. He admitted that he frequented several bars and restaurants at nights for various reasons, among which is the place known as J. & J. Bar, 3849 Prospect Ave., Cleveland, Ohio, where at various hours he meets customers for the sale of tires and in which place

he gets most of his business from truck drivers who frequent the place. He denied that he frequented any of those places for the purpose of associating or consorting with persons who have criminal records or who are known criminals and that his meeting or passing the time of day with such persons, some of whom he has been acquainted with for years, is entirely incidental to his presence in these various places. There is no evidence of record other than as above indicated that the respondent has failed to comply with his conditional parole.

There is no evidence of record that the respondent has been other than a person of good moral character for the past ten years. The record shows that the respondent's deportation would, undoubtedly, result in exceptional and extreme hardship to his United States citizen spouse. He has been physically present in the United States for a period of over ten years. He registered under the Selective Service Act of 1940 and registered as an alien enemy in 1942 in compliance with law. He has submitted address report cards as required by aliens residing in the United States.

The respondent is a non-quota immigrant under the provisions of Section 101 (a) (27) (A) of the Immigration and Nationality Act. However, upon seeking to reenter the United States he would be inadmissible for reason of his conviction of the crime of Perjury in 1932.

It has been held that although a deportable alien may establish satisfactory eligibility for discretionary relief, he is not entitled thereto as a matter of right. *Sleddins* v. *Shaughnessy*, 177

F. (2d) 363 (C. C. A. 3, 1949); *U. S. ex rel. Bartach* v. *Watkins*, 175 F. (2d) 245 (C. C. A. 2, 1949). The grant or refusal of discretionary relief rests with the Attorney General. Exercise of that discretion requires consideration of all the facts and circumstances of a particular case.

Full consideration of all the evidence and attending facts and circumstances in this case leads to the conclusion that this is not the type of case contemplated to be the beneficiary of discretionary relief in the form of suspension of deportation under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act. As a matter of administrative discretion the application will be denied.

Respondent has stated that if his deportation from the United States is directed by law, he desires to be sent to Italy.

Order: It is ordered that the application for suspension of deportation be denied.

It is further ordered that the order of March 20, 1953, directing that the alien be deported from the United States be re-instated in full force and effect.

The Board of Immigration Appeals has directed that this case be certified to that Board and final order will be entered in this case by the Board. You will be allowed 10 days in which to submit to this office any brief, memorandum, or request for oral argument which you desire to be transmitted with the record in this case for consideration by the Board.

B. DECISION OF BOARD GRANTING SUSPENSION

This case comes forward on appeal from an order entered by a special inquiry officer on November 15, 1954, denying the respondent's application requesting that his deportation be suspended under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952 and directing that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest. Counsel by brief and in oral argument on appeal urged that the respondent's deportation be suspended under the provisions of Section 244 (a) (5) of the Immigration and Nationality Act of 1952.

Discussion as to deportability: The respondent, a 58-year-old married male, native of Italy and last a citizen of the United States, first entered this country at New York, New York on May 25, 1914, at which time he was admitted for permanent residence (Ex. 5). The respondent was naturalized a citizen of the United States in the United States District Court, Cleveland, Ohio on March 18, 1929, at which time he was issued Certificate of Naturalization No. 3200557. United States Passport No. 142480 was issued to the respondent on November 19, 1929 (Ex. 4). The respondent departed from the United States during the latter part of the year 1929 and he last entered this country at New York, New York on March 1, 1930, at which time he was admitted as a citizen of this country (Ex. 4). The re-

spondent was convicted of the crime of perjury in the Common Pleas Court, Cuyahoga County, Cleveland, Ohio on June 2, 1932 (the offense being committed on or about April 7, 1932). He was sentenced to imprisonment in the Ohio State Penitentiary, Columbus, Ohio for an indeterminate period, being committed to the aforementioned institution on April [illegible], 1933. He remained an inmate of this institution until December 1, 1936, when his sentence was commuted by the Governor of Ohio. The record shows (Ex. 3) that it was decreed, ordered and adjudged by the United States District Court, Cleveland, Ohio on April 22, 1939 that the order of the United States District Court, Cuyahoga County, Ohio entered on November 15, 1928 admitting the respondent to citizenship, be vacated and annulled and certificate of naturalization number 3200557, issued by virtue of the latter order, be cancelled. In view of the foregoing, it is concluded that United States citizenship was erased ab initio. For the reasons stated, the respondent was an alien at the time he last entered the United States on March 1, 1930 and the crime of perjury for which he was convicted at Cleveland, Ohio on June 2, 1932 occurred within five years after his last entry. Accordingly, the respondent is subject to deportation on the charge stated in the warrant issued for his arrest on August 22, 1951.

Discussion as to eligibility for suspension of deportation: When this case was last before this Board on March 16, 1954, we denied the Assistant Commissioner's motion dated January 4, 1954 requesting that we reconsider our decision of December 28, 1953, wherein we entered an

order directing that the hearing be reopened for the purpose of affording the respondent an opportunity to apply for and prosecute an application for suspension of deportation as provided in section 244 (a) (5) of the Immigration and Nationality Act of 1952. The respondent's application requesting that his deportation be suspended under section 244 (a) (5) of the Immigration and Nationality Act was subscribed, sworn to and submitted for consideration on September 21, 1954, the date that the reopened hearing was conducted at Cleveland, Ohio (Ex. 10). The record reflects that the respondent was married to a native born citizen of the United States at Brooklyn, New York on April 16, 1922 (Ex. 11). Five citizen children were born of this union, two being born at Brooklyn, New York and the other three at Cleveland, Ohio (Ex. 10 & 18). All of these children are adults, the oldest being 31 and the youngest 23 (Ex. 10). The record shows that the respondent, except for three months' absence in Italy from November or December 1929 to March 1930, has resided continuously in the United States since his admission thereto for permanent residence on May 25, 1914. It is conceded that the respondent's citizen spouse is wholly dependent upon him for her support and maintenance. The record shows that the respondent's citizen spouse has been a semi-invalid for approximately 10 years, suffering with sciatic rheumatism, high blood pressure and diabetes. Within the past year and a half, she has been confined to the Mary Mount Hospital in Cleveland, Ohio on two occasions for hospitalization and treatment. Doctor V. D. Ippolito in

a letter dated September 16, 1954 advised that the respondent's citizen spouse cannot do any physical work because she is suffering from a complication of diseases (Ex. 16). The respondent has been employed as a tire salesman by the Cardinal Tire and Rubber Company, Cleveland, Ohio for the past two years, earning approximately $65 per week (Ex. 13).

The record shows that the respondent, over the years, has a record of gainful employment. He has accumulated an estate of approximately $20,000 from which he receives a monthly income of $80. There is nothing in the record to show that the respondent has been other than a person of good moral character since his release from imprisonment in 1936. The record reflects that he was arrested on May 28, 1945 and August 25, 1954 by the authorities at Pittsburgh, Pennsylvania and Cleveland, Ohio, respectively. He was charged with investigation and released shortly after each arrest (Exs. 6 and 12). There is nothing in the record to show that the respondent has ever been the recipient of public or private assistance. Likewise, the record is devoid of any evidence indicating that the respondent is now or has been a member of or affiliated with any proscribed or subversive organizations. Affidavits of numerous persons who have long known and are well acquainted with the respondent attest to the fact that he is a person of good moral character, friendly and loyal to the United States (Exs. 14, 15, 17 and 19). An independent character investigation conducted by the Service is entirely favorable to the respondent's application for the discretionary relief of suspension of de-

portation (Ex. 20). The record reveals that the respondent has been at liberty under bond in the sum of $5,000 and conditional parole executed on March 20, 1953 and on May 17, 1954, respectively, at Cleveland, Ohio. There is nothing in the record to indicate that the respondent has failed to comply with the terms of his conditional parole.

A brief résumé of the record shows that the respondent has resided continuously in the United States for a period of approximately 41 years. He is the husband/father of a citizen spouse and five citizen children. It is conceded that he has established good moral character for the ten year period required by statute and that he has been physically present in the United States for a continuous period of not less than ten years immediately preceding September 21, 1954, the date upon which he filed application for suspension of deportation. The respondent is eligible for a nonquota status. However, he is within one of the classes of persons enumerated in Section 212 (a) (9) of the Immigration and Nationality Act of 1952 ineligible to obtain immigration visas and he would therefore be inadmissible to the United States.

We have carefully considered all the evidence of record together with counsel's representations by brief and in oral argument on appeal and it is our considered opinion that the respondent's deportation would result in extreme and exceptionally unusual hardship to himself and his citizen family. For this reason and because he meets the other requirements of the statute, we have concluded to grant the respondent the discretionary

relief of suspension of deportation as provided in Section 244 (a) (5) of the Immigration and Nationality Act. Accordingly, the following order will be entered.

Order: It is ordered that the deportation of the alien be suspended under the provisions of Section 244 (a) (5) of the Immigration Act of 1952.

It is further ordered that the order entered by the special inquiry officer on November 15, 1954, be and the same is hereby withdrawn.

It is further ordered that if the Congress approves the suspension of the alien's deportation, the proceedings be cancelled and the alien, if a quota immigrant at the time of entry and not then charged to the appropriate quota, be so charged as provided by law.

It is further ordered that in the event Congress fails to take action approving suspension of the alien's deportation, the alien shall be granted the privilege of voluntary departure at his own expense in lieu of deportation and that if the alien, after notification, fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the alien shall be deported from the United States in the manner provided by law on the charge contained in the warrant of arrest.

C. DECISION OF BOARD WITHDRAWING GRANT OF SUSPENSION

This is a motion by the Service requesting that our order granting the alien suspension of deportation be withdrawn because information

possessed by the Service indicates that gambling activities in which the alien had engaged in the last ten years made him both statutorily ineligible for suspension of deportation and a person who was unsuitable for the grant of any administrative relief. The motion will be granted.

To be statutorily eligible for suspension of deportation, the alien is required, among other things, to establish that he has been a person of good moral character for a period of ten years prior to September 21, 1954 when he submitted his application for suspension of deportation (Section 244 (a) (5) Immigration and Nationality Act). An alien who during the ten year period in question derived his income "principally from illegal gambling activities" cannot as a matter of law establish that he has been a person of good moral character and is therefore ineligible for suspension of deportation (Section 101 (f) (4) Immigration and Nationality Act). The nature and source of the alien's income for the period in question is therefore a material matter. On the motion, the Service submitted information showing that in connection with naturalization proceedings, the respondent had shown his employment from 1943 to 1946 as being by an organization alleged by the Service to be a notorious gambling establishment in the State of Ohio. For the period 1943 to 1946, the information prepared by the alien concerning his employment for consideration by the Service and this Board *revealed that he was employed selling sweaters.*

As what is described to be a "link in a chain of evidence" which will show that the respondent

had engaged in gambling activities during the period in question, the Service pointed out in connection with this motion that when the respondent registered in 1940 as an alien, he listed himself as being employed in a gambling establishment. Clearly, a serious question by what appear to be admissions of the respondent himself is raised as to the manner in which the respondent earned his livelihood in the past ten years; whether this employment would preclude him from receiving suspension of deportation as a matter of law; and whether respondent made a full disclosure of his employment in connection with his application for suspension of deportation. These matters should be made a part of the record and the respondent be given an opportunity to explain the conflict.

The Service also desires to develop the fact that the respondent's conviction in 1932 for perjury arose out of an incident in which three individuals were killed in a shooting in Cleveland; and the fact that the respondent is a person whose credibility is suspect because of the manner in which he had concealed his arrest record on three occasions. We believe the Service should be given an opportunity to develop these and such other matters as they may deem material.

Counsel argues the motion should not be granted. He points out that there is nothing in the record from which it may be concluded that the respondent had failed to establish eligibility for suspension of deportation and that he knows of no evidence which should be considered by this Board. The fact is, that the Service desires to

reopen proceedings to enlarge this record and present matters material to the issue as to whether suspension of deportation should or should not be granted. The doctrine of res judicata does not apply to our decisions and we are not without power to reopen proceedings on motion of one other than the alien so that the record may contain all pertinent information.

Counsel states that no specific details of the derogatory information have been furnished so that he is unable therefore to dispute or refute the claim of the Service. He states also that it is his belief that the Service in making the motion has adopted as established certain newspaper comments which would not be admissible into evidence, one comment apparently being that a report concerning the alien was made by the Kefauver Committee. Counsel states his belief that no such report exists.

It appears that the Service will present information of a specific nature at the hearing which will enable counsel to be aware of the specific nature of its charges against the alien. He will then have adequate opportunity to present such evidence as he may deem material on the issue. The newspaper articles to which counsel refers and the Kefauver report have never been presented to this Board and are not mentioned by the Service. We have no knowledge of these matters. Our decision to reopen has been made solely on the matters presented to us by the Service and counsel (An envelope bearing respondent's name and marked confidential was submitted to us in the presence of counsel. The

contents of this envelope have not been referred to at this time and have formed no part in our conclusion to reopen).

Counsel argues that the Service has had ample opportunity for investigation and to present derogatory information at previous hearings. It is unnecessary to enter into a discussion of this issue. The principle of estoppel does not apply in these proceedings.

In a supplemental brief and on oral argument, counsel stated that there had been considerable newspaper publicity adverse to the alien and that this would have such a prejudicial effect against the alien in any future consideration of the case that he could not hope for a fair hearing. It is therefore requested that a postponement of the decision on this motion be made for a reasonable time to permit "a cooling off period" so that there would be a proper evaluation of any evidence that the Service desired to present. We do not believe decision should be delayed to a future date. Service officials and this Board are duty bound to make a fair and impartial decision. We believe that respondent will be given a fair and unprejudiced hearing and that counsel's objections on this score are premature. However, we believe that if counsel should desire that hearing be held at a city other than the one in which it was previously held, the Service should schedule the reopened hearing at a place mutually convenient to counsel and the Service.

Order: It is ordered that our order of March 8, 1955 granting the alien suspension of deportation be and the same is hereby withdrawn.

It is further ordered that the Service motion be and the same is hereby granted; that the proceedings be reopened to enable the introduction of such additional evidence as the Service and the alien may desire to present and for such other purposes as the special inquiry officer may deem appropriate.

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